Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing	)	
Procedures to be Followed When	)	
Formal Complaints Are Filed Against	)	
Common Carriers	)	

AMERITECH REPLY

I. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies (Ameritech) respectfully submit this Reply to Comments filed in the above-captioned proceeding. In this proceeding, the Commission undertakes the difficult but essential task of developing streamlined formal complaint procedures that allow, on the one hand, for expedited resolution of formal complaints, and, on the other, for the fair administration of justice.

Ameritech, for the most part, endorses the Commission's proposals to this end. With a few exceptions, discussed below, Ameritech believes that those proposals generally strike a reasonable balance between the goals of efficiency and fairness.

Ameritech is concerned, however, that some parties would significantly alter this balance by gaming the formal complaint process against incumbent local exchange carriers (LECs). In particular, some parties seem to take the view that the formal complaint process exists solely for the benefit of parties bringing complaints against LECs and that formal complaint procedures should be tailored to make it as easy as possible for parties to pursue such complaints and as difficult as possible for LECs to defend them.

The Commission must reject these attempts to bias its processes. If the Commission is to obtain a full and complete record for decision making in a compressed time frame, all parties -- complainants and defendants alike -- must exercise greater diligence in presenting and defending claims. Both sides must make a good faith effort to settle disputes, or at least to narrow the range of issues, before a complaint is filed; both must plead their case with specificity; both must document their pleadings to the maximum extent possible; and both must limit discovery requests to information that is essential to disputed issues. Placing these burdens solely or substantially on defendants, as some parties propose, would promote neither expedience in formal complaint processes nor fairness. In addition, contrary to the claims of some parties, rules that are skewed against defendants are not pro-competitive; rather, such rules distort the operation of competitive forces and undermine the benefits that competition would otherwise offer.

II. THE COMMISSION SHOULD ENSURE THAT ITS RULES DO NOT UNDULY COMPROMISE THE FAIRNESS OF THE FORMAL COMPLAINT PROCESS

A. Applicability of Streamlined Procedures

There is broad support in the record for the Commission's tentative conclusion that the streamlined formal complaint procedures adopted in this proceeding should apply to all formal complaints, not just those specifically enumerated in the 1996 Act. AT&T, however, argues that the Commission should adopt different rules for complaints brought under Section 271(d)(6) than for other complaints. The sole justification offered by AT&T for such different treatment is that Section 271(d)(6) complaints "will typically involve specific conduct and a limited factual background and must be decided within 90 days[.]"[1]

AT&T does not explain why Section 271(d)(6) complaints are any more likely than other complaints to "involve specific conduct and a limited factual background," and Ameritech does not believe this generalization to be true. Moreover, the Commission has made it clear that it intends to resolve all complaints on an expedited basis, not just Section 271(d)(6) complaints. Thus, the ostensible basis on which AT&T purports to distinguish Section 271(d)(6) complaints rings hollow.

The real basis for AT&T's proposed distinction between Section 271(d)(6) claims and other claims is that a Section 271(d)(6) claim cannot be brought against AT&T. Ameritech submits that if AT&T were subject to

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1 AT&T Comments at 2.

Section 271(d)(6) claims, it would not be so quick to propose the excessive burdens it suggests be placed on defendants in such claims. Be that as it may, there is no basis for treating Section 271(d)(6) claims differently from any other claims brought under the Act or Commission rules. While the expeditious handling of Section 271(d)(6) claims is undoubtedly critical, it is no more critical than the expeditious consideration of other types of claims that might be brought, including, for example, claims that an incumbent long-distance carrier is impeding the resale of its services or violating Section 271(e)(1) joint marketing restrictions. The Commission should adopt the same procedures for all formal complaints.

B. Pre-Filing Procedures

There is also broad consensus in the record in support of the Commission's proposal to require a complainant to certify that it discussed the possibility of a good faith settlement with the defendant carrier's representative prior to filing the complaint. As BellSouth notes, there is an unfortunate and increasing tendency for complainants to rush to the FCC -- and the press -- with any complaint they may have -- more intent on scoring a public relations coup than with resolving the matter in dispute. This tendency to view the formal complaint process as a public relations vehicle results in too many complaints that could be avoided through settlement discussions. Requiring complainants to certify that they have made a good faith effort to initiate settlement discussions should eliminate this problem. It should also reduce the Commission's caseload and facilitate resolution of complaints that are not settled by narrowing the range of issues in dispute.

Some parties understandably express concern that pre-filing requirements could be a waste of time if defendants are not, likewise, obligated to make a good faith effort to resolve the matters in dispute. Some go further and argue that defendants could abuse pre-filing requirements by engaging in stalling tactics -- egging the complainant along without ever seriously engaging in settlement discussions. Ameritech believes that this concern is something of a red herring. Under the Commission's proposal, a complainant would be obligated to make a good faith effort to settle the matters in dispute, or at least narrow the range of issues. Thus, if, at any point during the pre-filing stage, the complainant decides that the defendant is merely stalling and not seriously engaging in settlement discussions, the complainant is free to cut off the "sham" negotiations and file its complaint with the FCC. To be sure, some time would have been lost. However, the benefits to be gained from encouraging settlements or a narrowing of issues outside the complaint process exceed any risks of unnecessary delay. Moreover, to the extent that "bad faith" on the part of defendants is a concern, Ameritech would not oppose a requirement that defendants, as well as complainants, certify in their pleadings that they have entered into settlement discussions in good faith.

MCI, on the other hand, seeks to turn pre-filing procedures into something more than they ought to be: a vehicle for unrestricted, unsupervised discovery. According to MCI, the Commission's pre-filing procedures do not go far enough "since they could be satisfied by a single telephone call."[2] Proceeding from this dubious premise, MCI claims that the

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2 MCI Comments at 2.

Commission must, therefore, devise procedures that induce parties to exchange information and seriously discuss settlement before complaints are filed. MCI proposes that strict pleading requirements that would otherwise apply to a particular allegation be waived if the complainant has issued a pre-filing information request with respect to that matter and defendant has failed to respond or has provided an "inadequate" response. Stated differently, MCI proposes that complainants be given carte blanche to issue whatever "information requests" they please -- no matter how excessive and no matter how intrusive, and no matter how overbroad, and that defendants, in MCI's own words, be "penalized" for their refusal or inability to respond to such requests.

MCI's proposal -- which is another clear example of the regulatory gamesmanship to which Ameritech referred above -- is clearly specious. Indeed, a goal of this proceeding is to devise procedures for more targeted discovery. Giving complainants a license to issue whatever information requests they like, and then penalizing defendants for failing to respond "adequately," is directly contrary to these goals. MCI's proposal would engender countless "fishing expeditions" that would tax the resources and invade the confidentiality of prospective defendants. It should be rejected.

C. Format and Content Requirements

A number of parties express concern with the Commission's proposal to prohibit complaints that rely solely on assertions based on "information and belief." Some of this uneasiness is undoubtedly due to the ambiguity of the Commission's proposal. As ICG points out, it is unclear whether the Commission proposes to preclude allegations based on information and belief

altogether, or merely to preclude complaints that rely solely on assertions based on information and belief.

While Ameritech would agree with those who argue that it would be unfair to complainants to preclude any allegations based on information and belief in a complaint, Ameritech submits that reliance on such allegations should be severely limited. As Sprint points out, requiring greater diligence by complainants in presenting claims of misconduct "should reduce, if not eliminate, . . . frivolous complaints . . . [and] the practice by certain complainants of filing what amounts to notice complaints and then attempting to use discovery to gather evidence to substantiate their 'bare bones' allegations."[3] Certainly, complaints that rely to any significant degree on allegations based on information and belief are not likely to contain a "detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question."[4]

Ameritech also agrees with the majority of commenters who support the Commission's proposal to require complainants to append to their complaint documents and other materials to support their underlying allegations. This information is necessary if the defendant is to be able to respond with particularity to the allegations in the complaint.

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3 Sprint Comments at 1-2.

4 See Notice at para. 40.

Ameritech urges the Commission, however, to narrow its proposed requirement that complainants and defendants identify or provide with their pleadings copies of all documents, data compilations, and tangible things in their possession, custody, or control that are relevant to the disputed facts alleged in the pleadings. As framed, this proposal could potentially require the identification or production of literally mountains of documents. The materials produced could be so voluminous as to be of little utility in an expedited complaint proceeding. Moreover, defendants will not have time to amass these materials, particularly, if, as proposed, the Commission shortens the answer period from 30 to 20 days (a proposal that Ameritech opposes even without this added burden).[5] In this respect, the rule would be grossly unfair to defendants who will already be struggling to respond with particularity in a brief time frame to the allegations in the complaint.

As BellSouth notes, even the United States District Court for the Eastern District of Virginia, on whose "rocket docket" procedures the Commission models many of its proposed reforms, does not employ this rule.[6] The Commission should likewise reject it and replace it with a more narrowly tailored rule -- for example, a rule similar to that proposed by BellSouth, under which parties must identify documents relied on in their pleadings or upon which they intend to rely in their subsequent brief.

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5 The Commission also proposes to require parties to provide the name, address, and telephone number of each individual likely to have discoverable information relevant to the disputed facts. A number of parties correctly point out that requiring parties to include the telephone number of all persons likely to have relevant discoverable information is inappropriate as to any party represented by counsel. Employees of a carrier that is party to a proceeding should be contacted only through the carrier's counsel of record. See, e.g. AT&T Comments at 8-9.

6 BellSouth Comments at 13.

Finally, Ameritech agrees with commenters who argue that parties should not be required to provide proposed findings of fact and conclusions of law with their pleadings. These kinds of submissions are properly offered in a brief, not a pleading. Indeed, neither party will be in a position to offer proposed findings and conclusions before the pleading cycle has closed and discovery has been completed.

D. Time Period for Filing Answer

Ameritech joins other LECs in opposing the Commission's proposal to reduce the period for a defendant to file an answer to a complaint from 30 days to 20 days. While the Commission correctly points out that the Federal Rules of Civil Procedure currently provide defendants with only 20 days to file answers, the Commission ignores a critical distinction between federal rules of pleading and Commission rules: under the Federal Rules, "notice" pleadings are permitted because a trial is available to establish the facts; under Commission rules, "fact" pleadings are required. In addition, in federal civil practice, requests for extension of time are routinely granted, while under Commission rules, they are granted only for good cause.

The Commission itself has previously proposed -- and rejected -- a reduction in time to file an answer from 30 days to 20 days.[7] In rejecting this proposal the Commission specifically noted the differences between the Federal Rules and Commission procedures. It also found that "the proposed time reduction would unreasonably impair a defendant's ability to answer

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7 Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, 8 FCC Rcd 2614 (1993).

fully the complainant's allegations without yielding a benefit sufficient to mitigate this added burden."[8] That finding is no less true today. Indeed, to the extent the Commission requires defendants to provide much more information and documentation with their answers than has previously been required, the burden of meeting a 20-day time frame would be even greater now than in 1993. Ameritech submits that giving defendants adequate time to prepare their answers and the documentation that should accompany those answers will save time and resources in the long run by creating a better record for decision during the pleading phase of formal complaint proceedings.

E. Cease and Desist Orders

Virtually all parties that address the issue support application of the Virginia Petroleum Jobbers Association v. FPC[9] standard to requests for interim relief, such as cease and desist orders.[10] ICG, on the other hand, proposes a more relaxed standard. It claims that requiring a "likelihood of success" as a precondition for a cease and desist order "inherently favors the status quo," which is contrary to Congress' goal of expediting effective local exchange competition.[11] It suggests that the test should be whether complainant has mounted "a substantial challenge" to a defendant's practices. Similarly, it opposes requiring complainants to demonstrate "irreparable

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8 Id. at para. 12.

9 259 F.2d 921, 925 (D. C. Cir. 1958).

10 See, e.g. ACTA Comments at 7; TRA Comments at 20-21; MFS Comments at 16; CompTel Comments at 9.

11 ICG Telecom Group Comments at 18.

harm," proposing instead that the test be whether "competition will suffer if the cease and desist order is not granted."

ICG's less stringent standard should be rejected. First, if Congress had intended a departure from longstanding, well-established, and universally applied standards for cease and desist orders it presumably would have made this clear. It did not. Second, given the expedited time frames for resolving formal complaints on the merits, a relaxation of the standards for cease and desist orders would seem especially inappropriate. For example, since Section 271(d)(6) claims will be resolved in 90 days, awarding interim relief without a finding of a likelihood of success on the merits could cause needless, significant market disruption. It could also prejudice the ultimate disposition of complaints on the merits, since the Commission might be more inclined to rule in favor of a complainant if the Commission has already issued a cease and desist order against defendant.

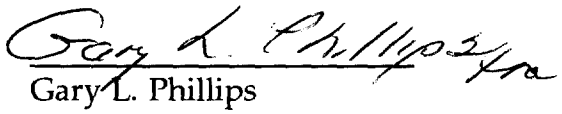
As US West notes, the standard for cease and desist orders is strict because a cease and desist order is an extraordinary remedy, requiring parties to alter their conduct before an adjudication of the actual merits of a complaint. Ameritech believes that cease and desist orders can be an important tool to halt certain egregious violations of the Act. This remedy, however, should not be imposed casually. The Virginia Jobbers standard is appropriate and should be retained.

F. Bifurcation of Liability and Damages Issues

There was substantial support in the record for the Commission's proposal to allow complainants to seek bifurcation of damages and liability issues. Pacific Telesis, however, makes a good point, which other parties overlook, and which the Commission needs to recognize. Specifically, Pacific points out that the Commission should recognize the difference between establishing *injury*, on the one hand, and *damages*, on the other. As Pacific notes, if complainant has not suffered any injury at all, plaintiff may not have a cause of action, and it may not have standing to pursue a cause of action. Moreover, even if injury is not a formal element of a particular claim, the existence or nonexistence of injury may be directly relevant to resolution of liability issues. For example, in applying vague rules or rules that do not, on their face, address a particular practice, the Commission may well consider whether or not a particular practice causes any injury. In addition, from a practical standpoint, if the Commission determines that a defendant is liable for actions which caused no injury, there will be tremendous pressure on the defendant to offer some damages in order to settle the damages phase of the proceeding. Finally, it is far easier to determine whether some damages have been suffered than to calculate the amount of those damages. Thus, the factors that underlie the Commission's proposal to permit complainants to elect bifurcation of damages issues do not apply to the question of whether there has been any injury at all. The latter determination can readily be made during the liability phase. Indeed, undertaking a damages inquiry in situations in which there has been no injury at all would be a waste of time and resources. Therefore, the Commission should clarify that, while

complainants may elect to bifurcate liability and damages issues, complainants must establish some injury during the liability phase of a proceeding in order to justify going forward to the damages phase.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Toni R. Acton, do hereby certify that a copy of the foregoing Ameritech Reply has been served on the parties listed on the attached service list, by first class mail, postage prepaid, on this 31st day of January, 1997.

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